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Cosmic Debris Etc., Inc.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

RS

COSMIC DEBRIS ETC., INC.,
a California corporation,

Plaintiff,

vs.

MARJORIE WEINMAN SHARMAT,
an individual, and MARC SIMONT, an
individual,

Defendants.

Case No. **09-2178**
COMPLAINT FOR DECLARATORY
RELIEF (28 U.S.C. §§ 2201, 2202)

Plaintiff Cosmic Debris Etc., Inc. ("Plaintiff") alleges as follows:

SUMMARY OF ACTION

1. Plaintiff owns copyrights and other rights in the character "Emily the Strange." Defendants claim that Plaintiff's "Emily the Strange" character infringes their copyrights in one of a series of books featuring "Nate the Great" and other characters. Plaintiff seeks a declaratory judgment that its "Emily the Strange"

1 character does not violate Defendants' rights in any manner, and that it may
2 continue to license and exploit that character without liability to Defendants.

JURISDICTION AND VENUE

4 2. This court has subject matter jurisdiction over the claims in this action
5 pursuant to 15 U.S.C. § 1121 and 28 U.S.C. §§ 1331, 1338(a), 2201 and 2202. This
6 court also has diversity jurisdiction in this matter pursuant to 28 U.S.C. § 1332 in
7 that there is a complete diversity of the parties and the amount in dispute exceeds
8 \$75,000. Venue is proper in this district under 28 U.S.C. § 1391(b) in that, *inter*
9 *alia*, Plaintiff and Defendants are located in and/or do business in this district, and a
10 substantial portion of the events described in this complaint took place in this
11 district.

PARTIES

12
13 3. Plaintiff Cosmic Debris Etc., Inc. ("Cosmic Debris") is a corporation
14 organized under the laws of the State of California which has its principal place of
15 business in Berkeley, California. Plaintiff owns copyrights, trademarks, and all
16 other related rights associated with the fictional character "Emily the Strange."
17 Works and merchandise featuring that character are sold throughout the United
18 States, including in the Northern District of California.

19 4. Plaintiff is informed and believes and on that basis alleges that
20 Defendant Margaret Weinman Sharmat ("Sharmat") resides in Arizona and
21 Defendant Marc Simont ("Simont") resides in Connecticut. Sharmat and Simont
22 claim to have authored parts of certain works which are sold throughout the United
23 States, including in the Northern District of California.

FACTS UNDERLYING THE CONTROVERSY

24
25 5. For many decades a common cultural motif that has appeared in many
26 creative works involves a woman or girl with long dark hair, possibly bangs, and
27 dark clothing who is associated with the macabre, occult, mysterious, or strange,
28 and is sometimes accompanied by creatures such as bats or black cats. Perhaps first

1 appearing in horror films in the 1930s and cartoons of Charles Addams that were
2 published in The New Yorker magazine beginning in 1938, characters depicting
these features became widely understood and accepted. Images from a few of the
4 Charles Addams cartoons are attached as **Exhibit 1**.

5 6. This cultural motif became more common beginning in the middle of
6 the 20th century. For example, the character "Vampira," a woman with long dark
7 hair, pale skin, a black dress, and an attraction to the macabre, appeared in the
8 1950s television program called "The Vampira Show." A 1960s television series
9 and series of films that began with the 1991 motion picture "The Addams Family,"
10 based on Charles Addams' cartoons, depicted an adult character named "Morticia"
11 and a daughter named "Wednesday" who both had long black hair and favored dark
12 clothing and the macabre. In 1981 a character called "Elvira, Mistress of the Dark"
13 appeared as the host of a horror television program, subsequently branching out into
14 a feature length motion picture and associated merchandise. Images of these
15 characters are attached as **Exhibit 2**.

16 7. Elements of this cultural motif were incorporated in the "gothic" or
17 "goth" movement that arose in the late 1970s and 1980s. Initially focused on
18 music, adherents to this difficult-to-define phenomenon could be characterized as
19 rebelling against society and appreciating the beauty in the "dark" elements of life.
20 Women and girls who view themselves as part of this culture often have long dark
21 hair, with or without bangs, emphasize pale skin, and wear black or red clothing.

22 8. This "Goth Girl" look has been a common element in creative works
23 for decades. For example, the 1988 motion picture "Beetlejuice" and its spinoff
24 animated television series both featured a "Goth Girl" named Lydia who had long
25 dark hair, bangs, pale skin, and wore dark or red clothing. Images of Lydia are
26 attached as **Exhibit 3**. Japanese comic books and animated films called "manga" or
27 "anime" frequently depict "Gothic Girls" with long dark hair, bangs, and short dark
28 dresses. Images of such "Gothic Girls" are attached as **Exhibit 4**. The television

1 series "NCIS" features a "goth" forensic investigator who has pale skin, long dark
 2 hair and bangs. An image of this character is attached as **Exhibit 5**. Visual
 examples of the "Goth Girl" look are ubiquitous on the Internet. Examples of such
 4 "Goth Girl" images are attached as **Exhibit 6**. Examples of "Goth Girls" with cats
 5 are attached as **Exhibit 7**. This cultural motif has become so common that online
 6 "Gothic Girl Dress Up" games, "Goth Girl" Halloween costumes and "Goth Girl"
 7 wigs that feature long dark hair and bangs are made for and sold to young girls, as
 8 shown in **Exhibit 8**.

9 9. Cosmic Debris' character "Emily the Strange" was created in 1991.
 10 "Emily the Strange" is a sullen "Goth" appearing young girl with long dark hair and
 11 bangs, pale skin, and dark clothing, who is sometimes depicted with black cats.
 12 "Emily the Strange" never smiles, is never pictured with other young girls or boys,
 13 and is identified with nonconformist expressions. Originally used to promote
 14 skateboards, "Emily the Strange" has subsequently been featured on, in and with
 15 T-Shirts and other clothing, handbags, cosmetics, footwear, jewelry, stationery,
 16 books, comic books, and other works and merchandise. "Emily the Strange" is
 17 Cosmic Debris' expression of the "Goth Girl" cultural motif.

18 10. Cosmic Debris has openly, notoriously, and continuously exploited
 19 "Emily the Strange" since 1991. It has spent millions of dollars promoting and
 20 developing the character and the goodwill associated with her over the last
 21 18 years, and it and its licensees have sold hundreds of thousands of units of
 22 "Emily the Strange" works and merchandise over that period.

23 11. Cosmic Debris owns all copyrights, trademarks, and other rights
 24 associated with "Emily the Strange." It has obtained about 60 U.S. copyright
 25 registrations in works that depict the character and five U.S. trademark registrations
 26 or applications in marks that include the name and/or image of the character.
 27 Listings of those copyright and trademark registrations are attached as **Exhibits 9**
 28 and **10**.

1 12. Defendant Sharmat claims to own the copyright in the text of a series
2 of about 25 children's books that include "Nate the Great" in the title. Defendant
3 Simont is an illustrator who claims to own the copyright in the artwork for some of
4 the works in the "Nate the Great" series.

5 13. Cosmic Debris is informed and believes that "Nate the Great," a child
6 private detective, is the principal character in those stories. Cosmic Debris is
7 informed and believes that other, subsidiary characters also appear in same "Nate
8 the Great" series from time to time.

9 14. One of the subsidiary characters in the "Nate the Great" series is
10 named "Rosamond." Like many children's characters, "Rosamond" is a young girl
11 with long dark hair and bangs who wears dresses of different colors and is
12 sometimes accompanied by cats. "Rosamond" frequently appears as rosy-cheeked
13 and smiling, and she spends time with other young boys and girls.

14 15. Cosmic Debris heard nothing from Sharmat or Simont concerning any
15 claim to rights in "Emily the Strange" from the time Cosmic Debris began
16 exploiting the character in 1991 until early 2009. However, in late 2008 various
17 websites began speculating that "Emily the Strange" was inspired by the
18 "Rosamond" character from the "Nate the Great" children's book series. These
19 speculations were apparently based on the juxtaposition of one specific image of
20 "Emily the Strange" and one particular page from one of the "Nate the Great" book
21 series, namely "Nate The Great Goes Under Cover." These images both depict a
22 young girl with long dark hair, bangs, pale skin and a short dress accompanied by
23 cats, and share a textual short phrase. Those images are attached as **Exhibit 11**.

24 16. Cosmic Debris stopped all publication, reproduction and distribution
25 of the "Emily the Strange" image used in that comparison and attached as
26 **Exhibit 11** by no later than 1998.

27 17. Without communicating with Cosmic Debris, Defendants Sharmat
28 and/or Simont in early 2009 began contacting entities with whom Cosmic Debris

1 has entered into “Emily the Strange” agreements, or with whom it is negotiating to
 2 enter into such agreements, and claimed that “Emily the Strange” infringes
 Defendants’ copyrights in the “Nate the Great” series in some manner. Such
 4 actions are jeopardizing Cosmic Debris’ “Emily the Strange” licensing activities
 5 and interfering with Cosmic Debris’ ability to conduct the business it has spent
 6 18 years developing.

7 NATURE OF THE PRESENT CONTROVERSY

8 18. Plaintiff is informed and believes that Defendants contend that:

9 (a) Cosmic Debris’ “Emily the Strange” character infringes
 10 Sharmat’s copyright in the text at page 14 of “Nate The Great Goes Under Cover”
 11 and/or in other unidentified text in other “Nate The Great” works;

12 (b) Cosmic Debris’ “Emily the Strange” character infringes
 13 Simont’s copyright in the image of Rosamond as depicted at page 14 of “Nate The
 14 Great Goes Under Cover” and/or in other unidentified pages of that or other works.

15 19. Plaintiff disputes Defendants’ claims, and contend that:

16 (a) No one, including Defendants, can successfully claim rights in
 17 the idea of a young girl with long dark hair, bangs, pale skin, and a short dark dress,
 18 accompanied by black cats, because such elements are not original to Defendants,
 19 are commonplace, and have been used in creative works for decades;

20 (b) Defendant Sharmat has no protectable interest in the images
 21 used to illustrate any of the “Nate the Great” series because she does not own the
 22 copyright in those illustrations;

23 (c) Defendant Simont has no protectable interest in the text of any
 24 of the “Nate the Great” series because he does not own the copyright in that text;

25 (d) Defendant Sharmat has no protectable interest in the short
 26 phrase common to the images depicted in **Exhibit 11** because copyright law does
 27 not protect short phrases;

28 (e) Defendant Simont has no claim for copyright infringement

1 based on the images depicted in **Exhibit 11** because they at most share only the
 2 unprotectable idea of a young “goth girl” with cats, the expression of which is
 different in the two works, and thus no protectable common elements in those
 4 images are sufficiently original or similar to constitute copyright infringement;

5 (f) Defendants have no protectable copyright interest in “Emily the
 6 Strange”;

7 (g) Plaintiff has not violated any protectable copyright interest
 8 Defendants may have in any of the “Nate the Great” books in which they claim an
 9 interest;

10 (h) Any claim Defendants assert for copyright infringement based
 11 on the specific images and text depicted in **Exhibit 11** are barred by the applicable
 12 statute of limitations, as Cosmic Debris ceased all use of its image shown in that
 13 Exhibit by no later than 1998;

14 (i) Defendants’ failure to object to Plaintiff’s open and notorious
 15 exploitation of its “Emily the Strange” character over the 18-year period in which
 16 Cosmic Debris has developed its business constitutes gross laches that precludes
 17 Defendants from objecting to Plaintiff’s exploitation of its “Emily the Strange”
 18 works or merchandise;

19 (j) Plaintiff has no obligation to pay Defendants compensation for
 20 any alleged violation of Defendants’ rights; and

21 (k) Plaintiff need not enter into any license agreement with
 22 Defendants to continue to create, distribute, promote, or license “Emily the
 23 Strange” works or merchandise.

24 20. A genuine controversy exists between Plaintiff and Defendants as to
 25 whether Plaintiff is violating any rights of Defendants through Plaintiff’s licensing
 26 and promotion of “Emily the Strange” works and merchandise, whether Defendants
 27 are entitled to recover from Plaintiff any compensation or damages as a result of
 28 Plaintiff’s past and future promotion and licensing of “Emily the Strange”

merchandise, and whether Plaintiff may continue to license and exploit its "Emily the Strange" character without liability or interference from Defendants.

PRAYER FOR RELIEF

Plaintiff requests that the court adjudge that:

1. Plaintiff is violating no rights of Defendants through Plaintiff's licensing and exploitation of "Emily the Strange";
2. None of the Defendants is entitled to recover from Plaintiff any compensation or damages as a result of Plaintiff's licensing and exploitation of "Emily the Strange";
3. Each of the Defendants be restrained from:
 - (a) instituting any action or proceeding to enjoin or restrain Plaintiff from continuing to promote, license and exploit "Emily the Strange" in all media;
 - (b) obtaining damages from Plaintiff for such actions; or
 - (c) contacting Cosmic Debris' actual or prospective licensees to claim that Cosmic Debris' "Emily the Strange" character infringes Defendants' rights in any manner;
4. Plaintiff recovers its costs of suit herein; and
5. Plaintiff receives such other and further relief as the court deems just and proper.

Dated: May 18, 2009

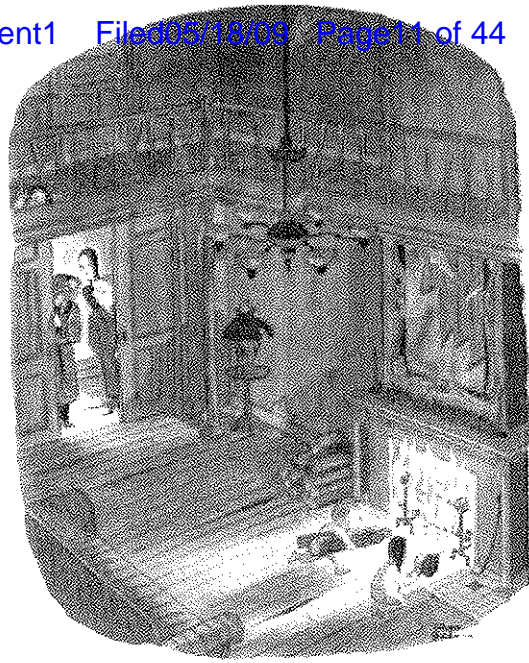
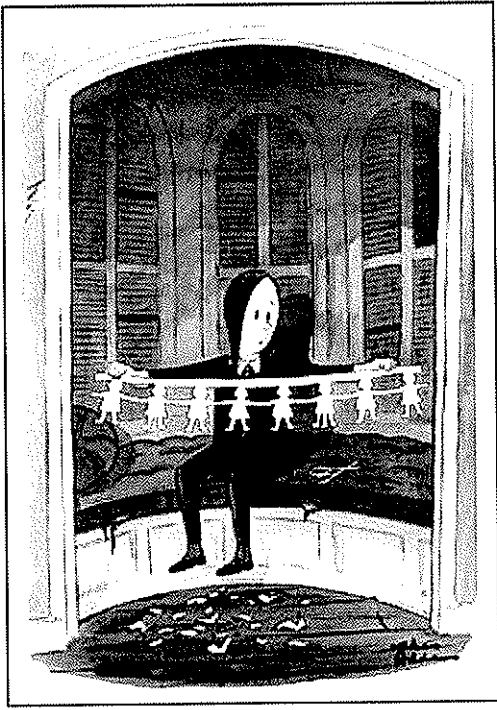
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Mark S. Lee
Susan E. Hollander
Christine Klenk

By: Mark S. Lee
Mark S. Lee
Attorneys for Plaintiff
Cosmic Debris Etc., Inc.

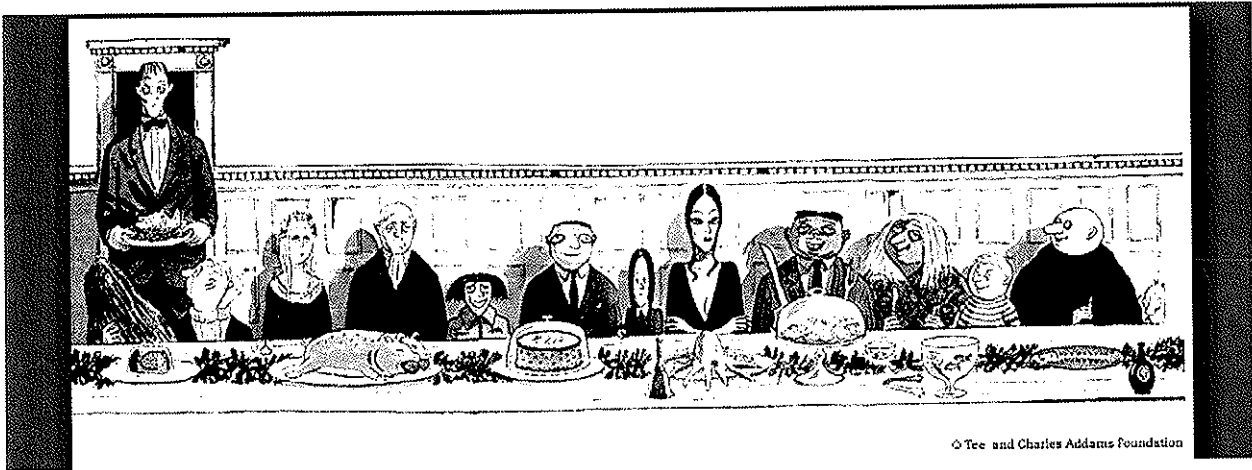
Exhibit 1

1938 - Present: Cartoonist Charles Addams: Art Appeared in The New Yorker Magazine, Books, Etc.

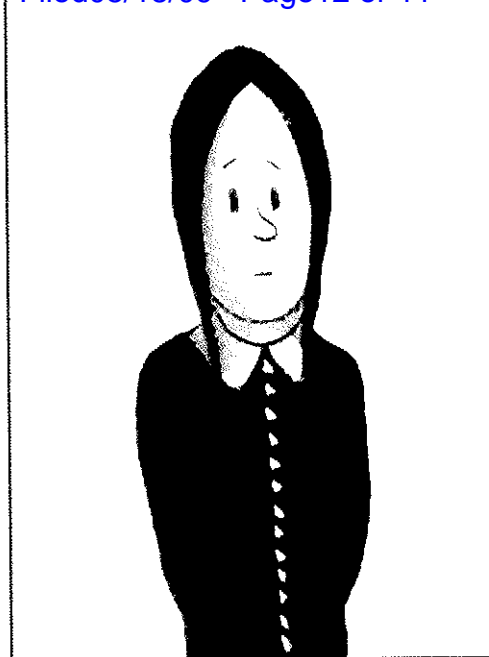
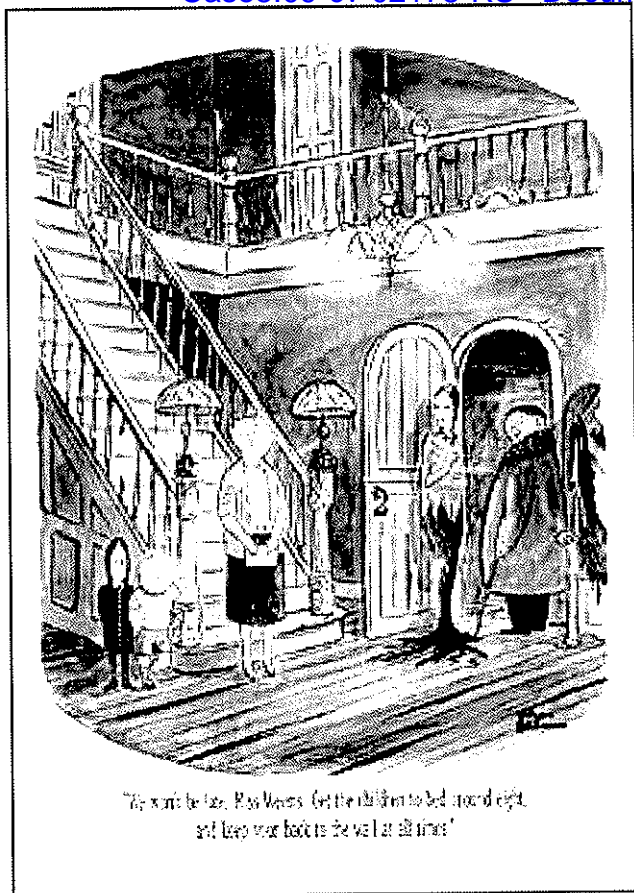




"The little dears! They still believe in Santa Claus."



© Tee and Charles Addams Foundation



WEDNESDAY

Child of wee is wane and delicate... sensitive and on the quiet side, she loves the pines and outings to the underground caverns... a solemn child, prim in dress and, on the whole, pretty fast... secretive and imaginative, peeps, seems underprivileged and given to occasional tantrums. Dances on one foot...

Charles Addams, 1963

We won't be late, Miss Weems. Get the children to bed around eight, and keep your back to the wall at all times."



"Just the kind of day that makes you feel good to be alive!"

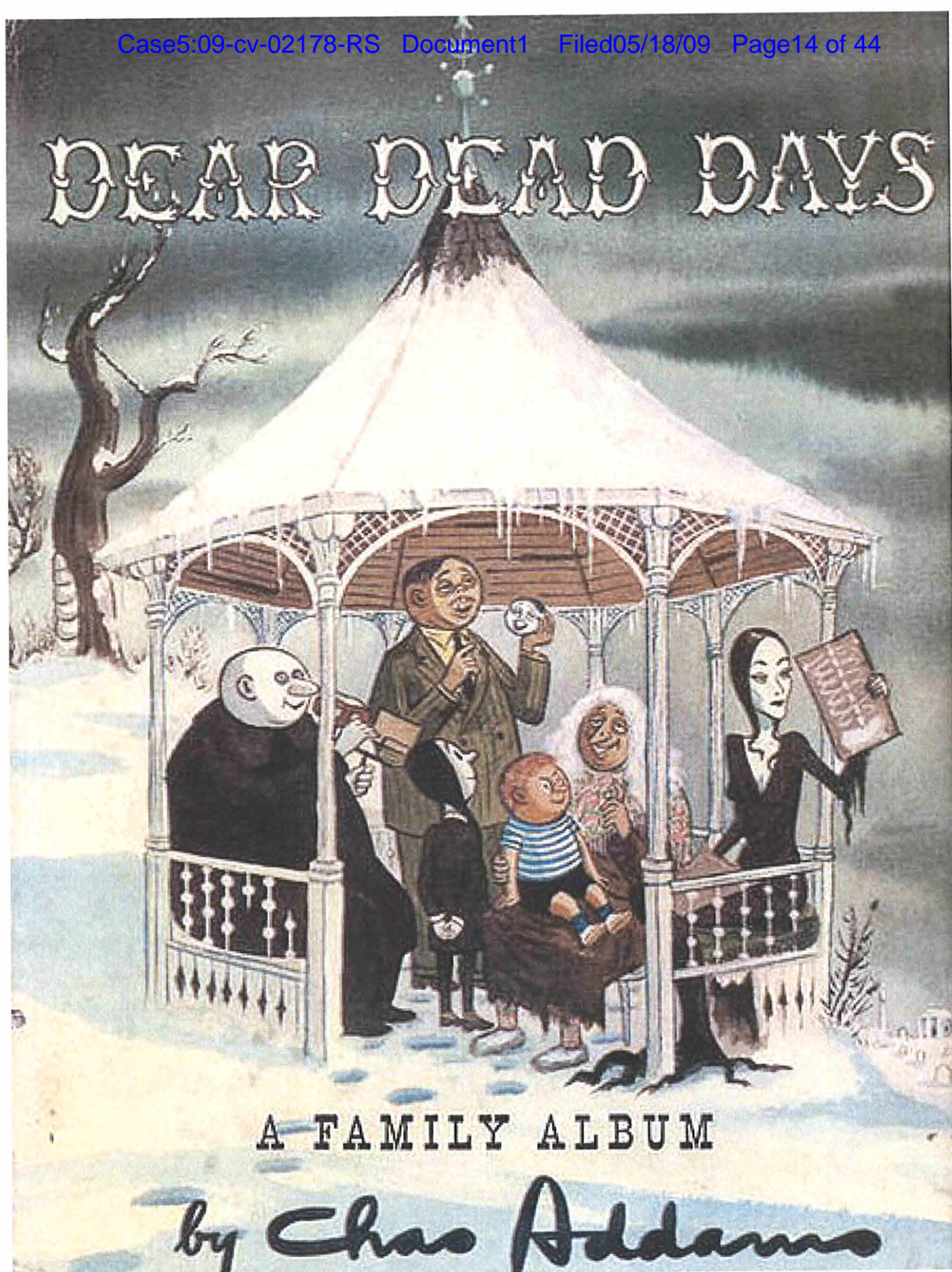
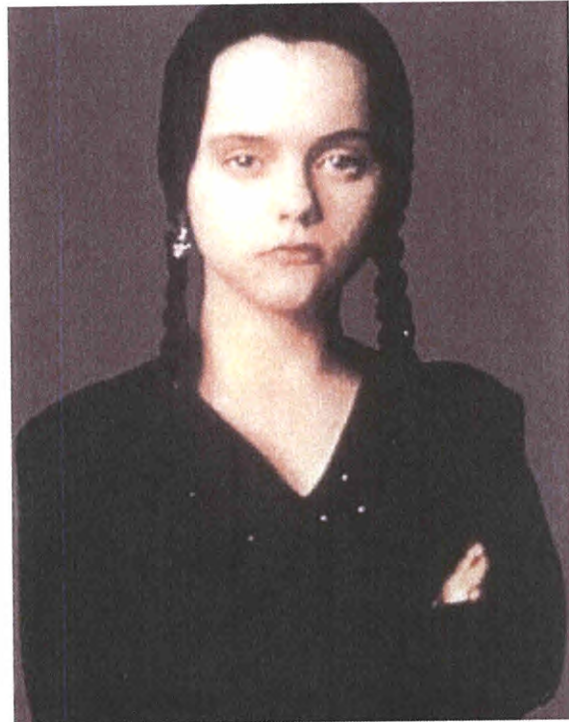


Exhibit 2

Vampira



Morticia and Wednesday



Elvira

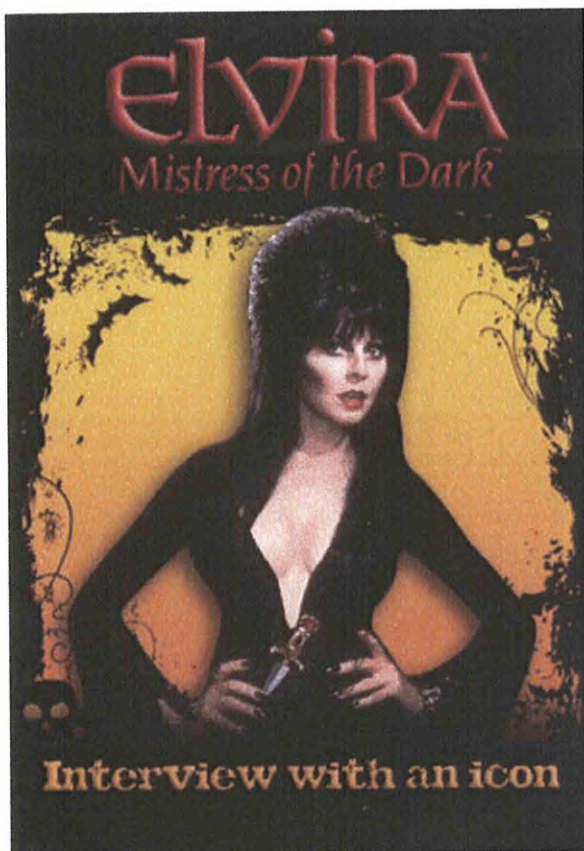


Exhibit 3

Beetlejuice and Lydia



Exhibit 4

Manga Anime Goth Girls



Exhibit 5



Exhibit 6



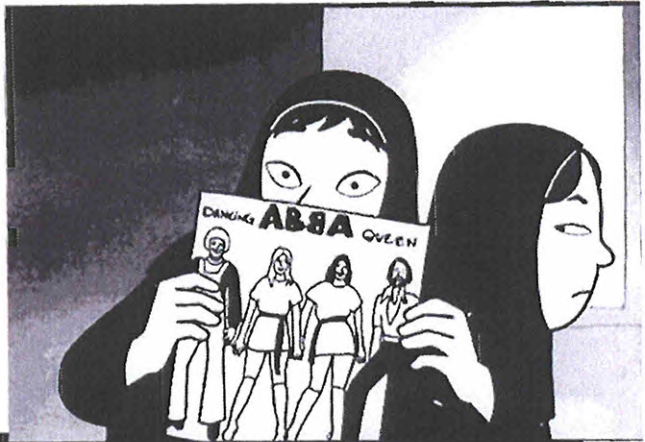
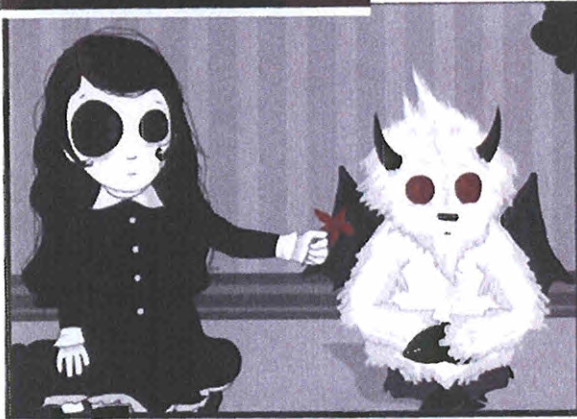


Exhibit 7

Goth Girls and Cats





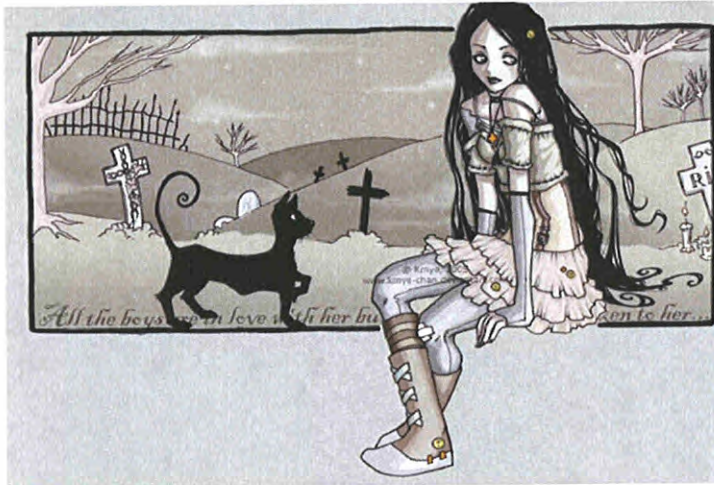
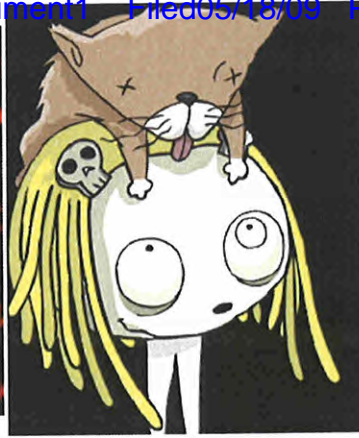


Exhibit 8

Gothic Girl Dress Up

BONNIEGAMES.com

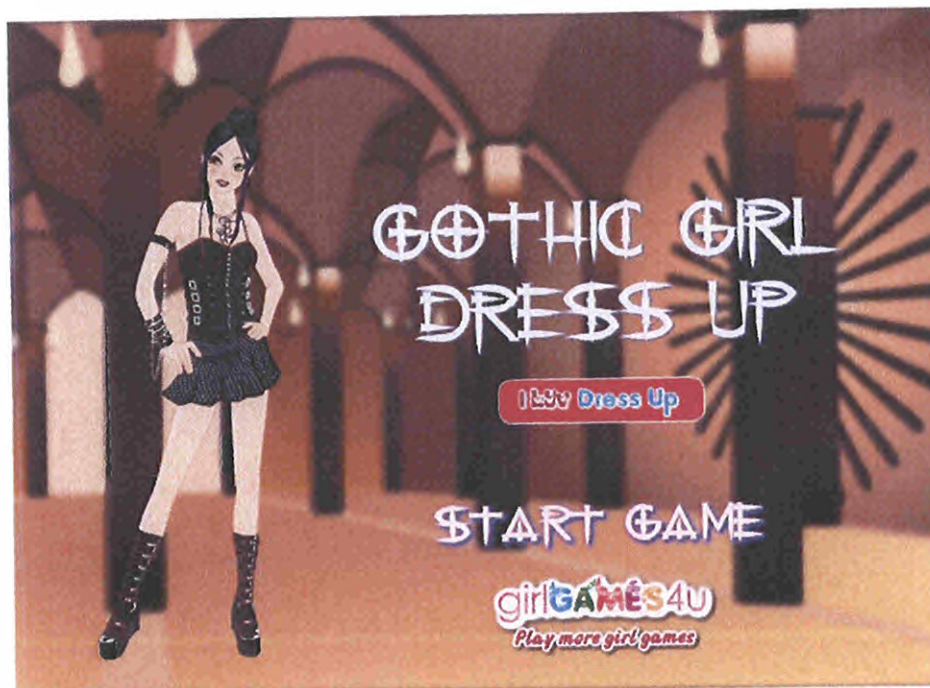


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Travian



Home >> Dress Up Games >> Trendy Fashion >> Gothic Girl Dress Up

Related Games



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Katie Dress Up



April Fool Prin...



www.fantage.com

Feedback - Arts by Gueira



Gothic Girl Dress Up

With this original fashion and trends game come the guidelines of the gothic style. Thanks to the clothes typical of this underground culture, you'll notice the darkness that reigns in this fashion, that for years has represented a true cultural movement.

Date: 17-02-2009 | Games: 14334

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Goth Ann Child Girl's Costume



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OTC

Goth Ann Child Girl's Costume. Dress up as a gothic sweetie for Halloween! Spooky and sassy, this cute Goth Ann ensemble will add some haunted fun to any costume party or pretend play adventure. All costumes are non-returnable. Imported.

Includes:

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- Leggings
- Bloomers
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- Synthetic Wig
- Choker

IN-HYG004

Goth Ann Child Girl's Costume

\$24.99 1 Set(s)

SIZE

COLOR

Qty:

[Sizing Chart](#)

Overall Rating



3.0 out of 5

Price



3.0 out of 5

Quality



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Goth Girl Wigs



Exhibit 9

COSMIC DEBRIS**EMILY COPYRIGHT REGISTRATIONS**

Number	Description
1.	Bad Kitty Patch (VA 1-147-030)
2.	Bad Trip (VA 1-147-027)
3.	Board to Death (VA 1-147-034)
4.	Cat shadow (VA 1-117-892)
5.	Dawn of Emily (VA 1-147-046)
6.	Don't Bother Meow (VA 1-147-031)
7.	Don't Call Emily (VA 1-147-039)
8.	Double Trouble (VA 1-213-662)
9.	Emily "Aim Low" (VA 951-843)
10.	Emily "Believes" (VA 951-838)
11.	Emily "Evil" (VA 951-839)
12.	Emily "Imagine" (VA 951-840)
13.	Emily "Lost" (VA 951-841)
14.	Emily "Odd" (VA 951-842)
15.	Emily "Twinkle" (VA 951-844)
16.	Emily Beware (VA 1-083-153)
17.	Emily Bleeding Heart (VA 0-011-631)
18.	Emily Cameo (VA 1-147-035)
19.	Emily Day Dreamer (Vau 570-553)
20.	Emily Eightball Misfit (VA 1-083-180)
21.	Emily Evil Eye (VA 1-011-630)
22.	Emily Get Lost (VA 1-011-632)
23.	Emily I Want You
24.	Emily Isn't Crazy (VA 1-083-154)
25.	Emily Listens (VA 1-138-619)
26.	Emily Photo Booth (VA 1-083-181)
27.	Emily Playtime (VA 1-147-040)
28.	Emily Rocks (VA 1-120-637)
29.	Emily Speak Loudly (VA 1-083-151)
30.	Emily Strange Posse (VA 1-147-038)
31.	Emily's Ghoul Scouts (VA 1-147-044)
32.	Emily's Posse (VA 1-011-629)
33.	ESP (Emily Strange Posse) (VA 1-083-182)
34.	ESP Hypnotic (VA 1-147-029)
35.	Evil Three (VA 1-138-618)
36.	Fight Like a Girl (VA 1-147-028)
37.	Follow the Leader (VA 1-147-026)
38.	Ghoul Scouts Lunch Box (VA 1-147-024)
39.	Good Girl, Bad Girl (VA 1-056-141)
40.	Grey Day (VA 1-147-023)

Number	Description
41.	Imaginary Enemies (VA 1-147-033)
42.	Kitty Dreams (VA 1-147-048)
43.	Kitty Inside (VA 1-138-617)
44.	Kitty Rag Doll (VA 1-147-025)
45.	Miles (VA 1-147-045)
46.	My Problem is You (VA 1-083-183)
47.	Nothing to Hide (VA 1-146-203)
48.	Outsider (VA 1-138-616)
49.	People Are Strange (VA 1-147-047)
50.	Portrait (VA 1-147-036)
51.	Posse Purrsonality (VA 1-138-615)
52.	Promises (VA 1-138-614)
53.	Rag Kitty Patch (VA 1-138-613)
54.	Sketchy Emily (VA 1-147-041)
55.	Smash It Up (VA 1-056-142)
56.	St. Emilia (VA 1-147-043)
57.	Stranger in the Night (VA 1-083-152)
58.	Strangers in the Night (VA 1-147-037)
59.	Stray (VA 1-011-633)
60.	We're All Strange (VA 1-138-621)

Exhibit 10

COSMIC DEBRIS**EMILY TRADEMARK REGISTRATIONS AND APPLICATIONS**






Country	Mark	Goods	Application No./ Registration No.	Status
United States	EMILY & DESIGN 	Class 16: Stickers, stationery, etc. Class 18: Wallets, purses, etc. Class 25: Clothing, etc.	2614845	Registered – Date of First Use: 3/30/1993
United States	EMILYSTRANGE 	Class 16: Stickers, stationery, etc. Class 25: Clothing, etc.	2655980	Registered – Date of First Use: 03/30/1993
United States	EMILY 	Class 14: Jewelry, watches, etc.	3225580	Registered – Date of First Use: 10/30/2004
United States	EMILY THE STRANGE & DESIGN 	Class 25: Clothing, etc.	3320139	Registered – Date of First Use: 01/15/2003
United States	EMILY THE STRANGE & DESIGN 	Class 18: Leather and imitations of leather, and goods made of these materials and not included in other classes, etc.	77/125085	Pending

Exhibit 11

Comparison



Rosamond did not look
hungry or sleepy.
She looked like she always looks.
Strange.

14



Emily didn't look
tired or happy.
She looked like
she always looks.
Strange.

COSMIC